STATE OF MICHIGAN

COURT OF APPEALS

C.C. MIDWEST, INC.,

Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R. V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH and RONALD J. KUBALANZA,

Defendants-Appellees.

UNPUBLISHED
June 22, 2001

No. 213386
Oakland Circuit Court
LC No. 97-550272-NZ

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

In this tortious interference of contract and business expectancy case, plaintiff appeals as of right from the trial court's order granting defendants' summary disposition pursuant to MCR 2.116(C)(4) and (C)(8).[1] We affirm.

I. Facts and Proceedings

Plaintiff C.C. Midwest, Inc., a trucking company, is a wholly owned subsidiary of CenTra, Inc. (CenTra). Until 1996, CenTra also owned Central Transport, Inc. (Transport), another trucking company. At the time of the sale, Transport employed approximately 235 truck drivers, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Teamsters), as independent contractors. As members of the

[1] Plaintiff contends that the trial court granted summary disposition pursuant to MCR 2.116(C)(4). At the May 6, 1998 summary disposition motion hearing, the trial court stated that it was granting defendant's motion pursuant to MCR 2.116(C)(4). However, the written order dated and filed, May 8, 1998 states that summary disposition was granted pursuant to MCR 2.116 (C)(4) and (C)(8). Because a trial court speaks through its written orders, the record reveals that defendants' motion was granted pursuant to both MCR 2.116 (C)(4) and (C)(8). See *People v Davie*, 225 Mich App 592, 600; 571 NW2d 229 (1997); See also *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

Teamsters, the truck drivers were entitled to take part in the Central States, Southeast and Southwest Regions Pension Fund (Pension Fund), a multi-employer pension trust that provides pension benefits to Teamster members.[2] As part of a collective bargaining agreement between Transport and the Teamsters, Transport made financial contributions to the Pension Fund on behalf of the truck drivers it employed. Following the 1996 sale, Transport negotiated with the Teamsters the closing of its business. As part of the closure, Transport agreed to pay a severance package totaling $4.6 million and, according to plaintiff, defendants agreed to permit the former independent contractors to make self-contributions into the Pension Fund for up to five years.

After Transport closed, plaintiff contacted truck drivers previously employed by Transport in order to negotiate possible service contracts, eventually entering into contracts with fifty-nine former Transport drivers. However, after being informed by defendants that they would not be able to continue to make self-contributions to the Pension Fund if they performed work for plaintiff or any other company affiliated with CenTra, twelve of these fifty-nine drivers terminated their contracts with plaintiff. In addition, plaintiff believed that it had a reasonable expectation of entering into contracts with an additional 153 truck drivers not formerly affiliated with Transport, but as a result of defendants "threats", plaintiff was only able to hire twenty-eight of the 153 potential non-Transport truck drivers.

In its complaint, plaintiff alleged that defendants actions of informing the former Transport workers that they would not be able to participate in the Pension Fund if they worked for plaintiff, amounted to threats, and that these "threats" were a deliberate attempt to deny plaintiff the services of the truck drivers. According to plaintiff, these "threats" occurred at a meeting held in Fort Wayne, Indiana in April of 1997 and in a follow-up letter dated May, 7, 1997. According to defendants, the purpose of both the meeting and the letter was to inform former Transport workers as to what options they had available to them as a result of Transport's closing and to also inform as to what consequences employment with plaintiff, or other trucking companies, would have on their rights under the severance agreement negotiated between Transport and the Teamsters as it applied to the Pension Fund. Specifically, plaintiff complained that defendants knew or had reason to know that it had entered into contractual relationships with former Transport drivers, and that defendants intentionally interfered with these contracts when they authorized or conveyed to former Transport drivers "threats" regarding non-acceptance of self-payments to the Pension Fund for periods in which they enter into independent contractor agreements with plaintiff. It was further alleged that defendants made these "threats" to the drivers in an effort to inflict injury upon plaintiff.

After plaintiffs filed the case in Oakland Circuit Court, defendants removed the case to the federal district court, where they argued that the Employment Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq*., preempted plaintiff's state law tort claims. The federal court found that because plaintiff's complaint asserted solely state claims and since ERISA did not provide plaintiff an opportunity to bring a civil enforcement action under

[2] Defendant Kubalanza is the Executive Director of the Pension Fund and the remaining defendants are the trustees of the Pension Fund.

§ 1132(a), the case was not removable under ERISA. *CC Mid West v McDougall*, 990 F Supp 914, 924 (1998).

Thereafter, on remand to state court, defendants moved for summary disposition pursuant to MCR 2.116(C)(4) and 2.116(C)(8). Defendants argued that the trial court did not have jurisdiction to hear the case because ERISA preempted plaintiff's state claims and, alternatively, that plaintiff failed to state a claim on which relief could be granted. The trial court granted defendants' motion stating on the record that the existence and administration of the Pension Fund is a critical element of plaintiff's claims, and therefore, plaintiff's claims were preempted by ERISA. Nonetheless, the trial court granted defendant's motion under both MCR 2.116(C)(4) and (C)(8).

II. Standard of Review

This Court's review of a motion for summary disposition is reviewed de novo in order to determine whether the moving party was entitled to judgment as a matter of law. *Rheaume v Vandenberg*, 232 Mich App 417, 420; 591 NW2d 331 (1998); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). With regard to a motion pursuant to MCR 2116(C)(4), we are to consider all pleadings, affidavits, and other documentary evidence submitted by the parties and construe them in favor of the nonmoving party. *Beulah Hoagland Appelton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). For a motion to be granted under MCR 2.116(C)(8), the pleadings must make it clear that the plaintiff has failed to state a claim on which relief can be granted and that no amount of factual development would justify the plaintiff's claim for relief. *Spiek, supra*. Further, the pleadings are comprised of the complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. *Village of Diamondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000), citing MCR 2.110(A); See also *Ferrell v Vic Tanny*, 137 Mich App 238, 243; 357 NW2d 669 (1984) and MCR 2.113(F)(1)(b) and (F)(2).

III. Analysis

On appeal, plaintiff argues that the trial court erred in determining that the general preemption provision of ERISA, § 1144(a), applied in this case and that its tortious interference claims were claims on which relief could be granted. In contrast, while defendants maintain that ERISA preempts plaintiff's tortious interference claims, they alternatively argue that the trial court correctly granted summary disposition to them pursuant to MCR 2.116(C)(8). Because we agree that plaintiff failed to state a claim on which relief could be granted, we affirm. Since we find that plaintiff failed to state a valid tortious interference claim under either of its two counts, we find it unnecessary to decide the question of whether plaintiff's claims are preempted by ERISA.

As a preliminary matter, we note that plaintiff failed to include the issue of whether the trial court correctly ruled on defendant's (C)(8) motion as a question presented before this Court. Thus, the issue has not been properly presented for appellate review and ordinarily we would not consider it. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264

(2000); See also MCR 7.215(C)(5). Nonetheless, because the issue is a question of law and the facts necessary for its resolution have been presented, *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995); *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 337; 512 NW2d 74 (1994) and since defendant properly raised the issue as an alternative ground for affirming the trial court's decision and we find it to be dispositive,[3] we will address it. *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *In re Herbach Estate*, 230 Mich App 276, 284; 583 MW2d 541 (1998).

The elements of tortious interference with a business expectancy or relationship are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) damage to the plaintiff. *BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996), citing *Lakeshore Community Hosp v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). Similarly, the elements of tortious interference with contractual relations are that (1) a contract existed, (2) it was breached, and (3) defendant instigated the breach without justification. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992), citing *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989); See also *Derosia v Austin*, 115 Mich App 647, 653; 321 NW2d 750 (1982). In order for a plaintiff to recover under either theory of tortious interference, the plaintiff must allege that the defendant's international interference was a "'per se wrongful act or the doing of a lawful act with malice'" and without justification in law. *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). See also *BPS, supra*. For an act to be "wrongful per se", it must be an act "that is inherently wrongful or an act that can never be justified under any circumstances." *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 457; 502 NW2d 696 (1992), citing *Prysak v RL Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). To show that a lawful act was committed with malice and without justification in law, "the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive or interference." *BPS, supra*, citing *Feldman, supra* at 369-370; See also *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994); *Dolenga v Aetna Casualty & Surety Co*, 185 Mich App 620, 626; 463 NW2d 179 (1990). Further, if a defendant's actions were motivated by legitimate business reasons, then those actions would not constitute improper motive or interference. *BPS, supra*, citing *Michigan Podiatric Medical Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989).

Defendants, as fiduciaries of the Pension Fund had a statutory obligation under ERISA to inform plan participants of matters that could affect their interests under the plan. See *Varity Corp v Howe*, 516 US 489, 502; 116 S Ct 1065, 1073; 134 L Ed 2d 130 (1996); See also 29 USC 1104(a) and MCL 700.814(1); MSA 27.5814(1). In addition, plan participants are always entitled to information necessary to enable the participant to enforce his rights under a plan or to redress a breach of trust. *In re Childress Trust*, 194 Mich App 319, 328; 486 NW2d 141 (1992),

[3] We note that even if we were to agree with plaintiff that it's claims were not preempted, we would then have to address the issue of whether plaintiff's complaint alleged a valid claim on which relief can be granted.

citing 1 Restatement Trusts, 2d, § 173, comment c, p 378. The United States Supreme Court further stated in *Varity*, *supra*, that:

> Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of power "appropriate" to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan. . . . To offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially the same kind of plan-related activity. [*Id*. at 502-503; 116 S Ct at 1073, citing ERISA §§ 102, 104(b)(1), 105(a).]

Here, it is apparent that defendants actions were undertaken as fiduciaries of the Pension Fund. By law, they had a duty to inform their participants of their rights under the plan and how those rights may be effected by certain employment contracts. *Varity*, *supra*; *In re Childress Trust*, *supra*. The letter defendants sent to the plan participants clearly informed the participants that they had the opportunity to make self-contributions for a period of up to five years and also informed them that they could not make contributions during any period of time in which they were employed by certain companies, including plaintiff. The letter also communicated to the participants of the plan that they should contact the Pension Fund's toll free number in order to find out how their decisions may impact their benefits. As such, it is apparent that defendants were acting under legally mandated obligations to inform its participants of its rights under their plan.[4] Hence, defendants were motivated, at least in part, by legitimate business reasons and therefore could not have tortiously interfered with plaintiff's contracts or business expectations. *BPS*, *supra*; *Coleman-Nichols*, *supra*; See also *Patillo*, *supra*. Accordingly, defendants were entitled to summary disposition pursuant to MCR 2.116(C)(8).[5]

---

[4] In fact, after reviewing the record, this Court has been unable to find any evidence or assertion by plaintiff attacking the veracity of defendant's letter concerning the participants' employment with plaintiff. Instead, plaintiff maintains that the participants were not entitled to make benefits regardless of their employment status. Assuming this to be true, then plaintiff's claim is without merit. The former Transport drivers would have become aware of this fact when their self-contributions were denied, therefore, indicating to the former Transport drivers that working for plaintiff would have no impact on their ability to make (or not make) self contributions to the Fund. Accordingly, giving plaintiff the benefit of the doubt on this question, we are persuaded that defendant's actions caused no damage to plaintiff. See *BPS*, *supra* at 687. Further, plaintiff's complaint does not indicate how defendant's "threats" to the former Transport workers would have any affect on the non-Transport drivers decisions to work for plaintiff.

[5] Even though this decision is reached by reviewing the contents of defendant's letter to the Pension Fund participants, because the letter was a written document, attached to plaintiff's complaint, and plaintiff's complaint relied on the letter, this Court should review the letter when assessing whether plaintiff stated a claim on which relief could be granted. See *Ferrell*, *supra* at 243. See also MCR 2.113(F)(1)(B) and (F)(2); 4 Dean & Longhofer, Michigan Court Rules Practice, pp 316-317 (1998).

Because we find that summary disposition was appropriate under (C)(8), we need not determine plaintiff's claim was also properly dismissed under (C)(4) based ERISA preemption. See *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 529; ___ NW2d ___ (2000), citing *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997); *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147, 150; ___ NW2d ___ (2000). See also *Kurz v Michigan Wheel Corp*, 236 Mich App 508, 516; 601 NW2d 130 (1999); *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder